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COVID-19: Workplace Exodus

by Jon Neiditz , Diane L. Prucino

Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main COVID-19 Task Force page for updates.

COVID-19 will change organizations, government, and the relationship of individuals to both; at this moment, ***the right to be let alone*** *has become* ***the duty to be alone****, not principally for one's own sake but for the protection of the vulnerable.* This blog will focus in the coming weeks on a series of practical tips from people helping organizations cope with COVID-19. Since these lessons come from the early days of the COVID-19 emergency, the lessons learned and big questions below were forged while tests were still largely unavailable and when the voices of the scientific community were just beginning to be heard. The guidance below will be updated and refined in future blog posts as more tests become available and information about the virus grows.

How HIPAA Can Help When There are Tests

Let us say that you have asked your employees to report exposure to COVID-19, but in the absence of widespread testing, there is not much your employees can tell you, and until paid leave is known to be provided there may not be much they want to tell you. Let's assume that an employee who has not self-reported visits a HIPAA-covered doctor who identifies symptoms that look very much like COVID-19, but the doctor cannot get a test. If the doctor could get a test and it came back positive, the doctor could give you critically-important information to your workforce and company under Section 164.512(j) of the HIPAA Privacy Rule. However, without the test, the doctor cannot conclude that the disclosure would give you information about a serious or imminent threat to public health that you could lessen, so the most the doctor can do is to ask your employee to authorize a disclosure to you.

Return to Work Without Tests or Trust

Fortunately, the employee signs the authorization, the doctor notifies you as the employer, and you send your employee home. The employee's condition worsens to include pneumonia, but the doctor still can't get a test. You check both the CDC and WHO websites, which is what we are urging you to do at least daily because your friends at the CDC have told you that the information on their website -- while still of the highest quality -- may be subject to political censorship. You find a protocol for when the employee tests negative (the well-known 14-day protocol), and a longer protocol for when the employee tests positive, but of course there is no protocol for when nobody can get a test. You can't ask for the test, nor can the employee; only a doctor can do that, and the doctors you know are being turned down. Under the CDC's guidance for "Influenza-Like Illness," you could ask

the employee to return to work 24 hours after the employee becomes asymptomatic, *so assuming that the 14-day protocol applies when someone does not test positive,* you could ask the employee to return upon the greater of 14 days or 24 hours after the cessation of symptoms. But is that assumption that the shorter protocol applies *because there are no tests* justifiable in view of your obligation to maintain a safe and healthful workplace free from recognized hazards under the General Duty Clause of the Occupational Safety and Health Act (OSHA)?

How The Lack of Tests Accelerates Remote Workforces

How you handle that last big question and many others is not only situation specific, but has been changing daily with new information about COVID-19, in part because there are real questions about whether COVID-19 involves real or perceived impairment. The Americans with Disabilities Act (ADA) defines disability as a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment. Based on the early information made available concerning COVID-19, some employment lawyers ventured that it might not constitute an impairment for those at low risk. Now it is more apparent that we just do not know yet if the lung-scarring and other longer-term impacts of COVID-19 among those to whom it is not fatal are reversible or may result in long-term impairment. If COVID-19 is a disability, a wide range of issues arise under the ADA, including the need to provide accommodations, which makes the requirement of return to work during the emergency for those who test positive or with underlying conditions very difficult. More generally, the absence of testing in many areas of the country to date makes social distancing the right answer more of the time, accelerating decisions to make as much of the workforce remote as possible. In any event, most employers in the situation above would require the employee to stay home for 14 days if asymptomatic 24 hours prior to the end of that period. Is there a risk of liability for insisting on a 14-day quarantine? Perhaps, but it is less than the risk of liability for permitting someone who is reasonably suspected of having COVID-19 back in the workforce too soon.

Communicating About COVID-19 in the Two Worlds of Work

As with any exodus, you are not sending your employees to places without prior inhabitants or viruses. Asking about whether anyone in the employee's family is sick risks discrimination claims under the Genetic Information Nondiscrimination Act (GINA), because GINA's definition of genetic information includes family medical history, and relationship discrimination issues under the ADA. What you need to know, though, has much less to do with relationships and much more to with physical proximity and the surfaces in the home. By focusing on whether people living in the same home have COVID-19 symptoms – and never on the underlying conditions that make COVID-19 more serious – or have tested positive, you can avoid GINA and ADA relationship discrimination issues and get the information critical to protecting your workforce. For that reason, the critical questions should be "has anyone who lives with you or in the same building as you been diagnosed with COVID-19? Has anyone who lives with you shown flu-like symptoms?" Any positive response should result in the employee being sent home for 14 days if your employees are not already at home. Future posts will deal with communication about COVID-19 when employees have already made the exodus.